IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.2116 OF 2006

M/s. Novus Pharmaceutical Ltd. & Ors. ...Petitioners.
Vs.
Union of India & Ors. ...Respondents.

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Dr. Virendra Tulzapurkar, Senior Advocate with Mr. S.C. Bora for the Petitioners.
None for the Respondents.

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CORAM : KSHITIJ R. VYAS, C.J. &
DR.D.Y.CHANDRACHUD, J.

April 24, 2006.

ORAL JUDGMENT (Per Dr. D.Y. Chandrachud, J.) :

Rule, by consent of Counsel returnable forthwith. By consent of Counsel and at the request of Counsel taken up for hearing.

2. All the Petitioners who are, or as the case may be, were licensed pharmaceutical units within the jurisdiction of the principal bench of this Court at Mumbai, moved these proceedings initially before the Aurangabad Bench seeking a postponement of a notification dated 30th June, 2005 by which the Drugs and

Cosmetics (Fifth Amendment) Rules, 2005 were notified. The Petition was transferred before the Principal Seat of the Court at Mumbai. The grievance of the Petitioners is that as a result of the amendments that have been brought to the Drugs and Cosmetics Rules by the amended provisions, several changes were required to be made by manufacturers in respect of plant, equipment, machinery and maintenance of records. The submission was that this would involve a high cost for which funds were required to be raised. The Petitioners received notices from the Food & Drugs Administration of the State Government calling upon them to comply with the provisions of Schedule M as amended, failing which it was stated that their licences would be suspended. The licences of the Petitioners were suspended. Though the order of suspension is an appealable order, it has been submitted that since the notification was issued by the Union of India, no purpose would be served by exhausting the remedy of an appeal. In sum and substance, it has been urged that reasonable time should have been granted to the manufacturers to comply with the amended requirements of the rules.

3. Now the principal prayer urged in the petition, prayer

clause (a), is simplicitor for an extension of time to comply with the provisions of the rules. There is no challenge to the constitutional validity of the rules nor is any such challenge pressed before the Court. The rules constitute delegated legislation made in pursuance of the power vested in the delegate by the competent legislation. This Court in the exercise of its jurisdiction under Article 226 of the Constitution would not be justified in entertaining any such plea. Once the rules are valid, as indeed they must be regarded in the absence of any challenge in these proceedings, it would be manifestly impossible to grant any relief of the nature that has been sought. That plainly lies outside the jurisdiction of the writ Court under Article 226 of the Constitution. The Petitioners have remedies available in law against the order of suspension. In so far as the grant of reasonable time for compliance is concerned, this Petition comes up at the end of April 2006, nearly ten months after the date that was prescribed for the enforcement of the rules.

4. The power to frame Rules is a power conferred by the legislature upon its delegate. The power is to make delegated legislation. Delegated legislation can be challenged on the ground that it is ultra vires either for the reason that it violates constitutional

safeguards or that the delegate in framing the rules or regulations has acted beyond the scope and purview of the statute under which the power to frame rules has been delegated. Subject to a challenge on the ground of delegated legislation being ultra vires, it is the legislature which delegates the power that is vested with the authority to control the action of the delegate. Courts do not and cannot issue a writ of Mandamus either to enact legislation or to bring the legislation that was enacted into force, where the power to enforce legislation is conferred upon the executive. Subordinate or delegated legislation partakes of a legislative character and what holds in relation to legislation must apply to delegated legislation. No Court will, therefore, direct the delegate to frame rules or to bring them into force when made; if the rules have not been brought into force. The legislature has control over the delegate. Equally, the Court cannot ordain that a valid piece of delegated legislation should not be enforced either on the ground of administrative or other difficulties.

5. In **A.K. Roy vs. Union of India**, AIR 1982 SC 710, a Constitution Bench of the Supreme Court formulated the principle of law in the following words:

> "The Parliament having left to the unfettered judgment of the Central Government the question as regards the time for bringing the provisions of the 44th Amendment into force, it is not for the Court to compel the Government to do that which, according to the mandate of the Parliament, lies in its discretion to do when it considers it opportune to do it. The executive is responsible to the Parliament and if the Parliament considers that the executive has betrayed its trust by not bringing any provision of the Amendment into force, it can censure the executive. It would be quite anomalous that the inaction of the executive should have the approval of the Parliament and yet we should show our disapproval of it by issuing a mandamus. The Court's power of judicial review in such cases has to be capable of being exercised both positively and negatively, if indeed it has that power: positively, by issuing a mandamus calling upon the Government to act and negatively by inhibiting it from acting. If it were permissible to the Court to compel the Government by a mandamus to bring a constitutional amendment into force on the ground that the Government has failed to do what it ought to have done, it would be equally permissible to the Court to prevent the Government from acting, on some such ground as that, the time was not yet ripe for issuing the notification for bringing the Amendment into force. We quite see that it is difficult to appreciate what practical difficulty can possibly prevent the Government from bringing into force the provisions of S.3 of the 44th Amendment, after the passage of two and half years. But the remedy, according to us, is not the writ of mandamus." (emphasis supplied).

Subsequently, in **Aeltemesh Rein vs. Union of India**, (1988) 4 SCC 54, while dealing with the inaction of the Central Government over nearly three decades to bring the provision of Section 30 of

the Advocates Act, 1961 into force, the Supreme Court held that it was not open to the Court to issue a writ in the nature of Mandamus to bring a statute or a statutory provision into force when according to the statute, the date on which it was to be brought into force was left to the discretion of the Central Government. However, if there was a long inaction, as there was in that case, the Court held that the Central Government could be asked to consider whether the provisions should be brought into force. In **M. B. Majumdar v. Union of India,** AIR 1990 SC 2263, the Supreme Court held that the relief which was claimed in the petition of a direction to amend the Administrative Tribunals Act, 1985 and the Rules framed thereunder to equate the Members of the Tribunal with the Vice Chairman of the Tribunal in the matter of pay and age of superannuation could not be granted and this was rightly not disputed. Finally, it would be necessary to advert to the decision in **State of Jammu & Kashmir, vs. A. R. Zakki**, AIR 1992 SC 1546, where a Bench of three Learned Judges of the Supreme Court held that a writ of Mandamus cannot be issued to enact a particular legislation. The Court held that the same is true as regards the executive when it exercises the power to make rules, which are in the nature of subordinate legislation. These principles

of law are indeed settled beyond any doubt whatsoever.

6. What the Petitioners before the Court have prayed is a writ of Mandamus commanding the executive not to enforce the provisions of the amended rules or to defer their implementation. No such relief can be granted.

7. Hence, for the reasons already indicated, the relief that has been sought lies outside the scope and purview of the jurisdiction under Article 2226. The petition shall accordingly stand dismissed.

CHIEF JUSTICE

Dr.D. Y. Chandrachud, J.